UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

McLAUGHLIN AND SCHULZ, INC. Employer and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 49, AFL-CIO Petitioner	Case 18-RC-16628

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me.

Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[1]

[1] The Employer, McLaughlin and Schulz, Inc., a Minnesota corporation, is an asphalt paving contractor with offices and shop facilities in Marshall, Minnesota, and Watertown, South Dakota. The Employer annually paves roads at sites located in the States of Minnesota, South Dakota and North Dakota. During calendar year 1999, a representative period, the Employer provided goods and services valued in excess of $50,000 to points located directly outside the State of Minnesota, and it purchased goods and materials valued in excess of $50,000, which were shipped to its Minnesota sites directly from points located outside the State of Minnesota.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Petitioner seeks a unit of all full-time and regular part-time equipment operators employed by the Employer. Petitioner contends that such a unit would consist of about 66 employees. The Employer contends that the unit sought by Petitioner is too narrow, and that the only appropriate unit must include equipment operators, laborers, truck drivers, and "possibly some mechanics and some technicians." According to the Employer, the unit would then consist of 160 employees.

The Employer is a paving contractor. It bids on public works projects, such as city, county and state roads. It also contracts with private parties to construct or repair parking lots and driveways. The Employer estimates that during its season in 1999, about 90 percent of its business involved public projects. The Employer has two large paving crews, each consisting of 25 to 35 employees. Each large paving crew is supervised by a plant superintendent and road foreman. Generally, the large paving crews work on public road projects. Each of the large paving crews operates with a portable hot-mix plant that is moved from job to job as the paving crew moves from job to job. The Employer also has one seal-coat crew consisting of 20 to 25 employees; one crack-filling crew consisting of three to four employees; and three small paving crews, each with 12 to 15 employees. Each of these crews is supervised by a foreman. The small paving crews generally utilize one of three permanent hot-mix plants maintained by the Employer. These permanent plants are located in Marshall and

Worthington, Minnesota, and in Watertown, South Dakota. The Employer's job sites are located in western Minnesota, North Dakota and South Dakota. The Employer and Petitioner stipulated that the plant superintendents and all foremen should be excluded from any unit found appropriate because they are supervisors within the meaning of Section 2(11) of the Act.

Every crew has a mix of truck drivers, operators and laborers. Each crew works in a different geographical area. For example, Foreman Mary Siegle testified that her crew generally works in the Watertown, South Dakota area. The crew obtains asphalt from the Employer's permanent plant in Watertown. The duration of jobs is from less than a day to no longer than two days, at which time Siegle's crew moves to the next job site. On the other hand, the large paving crews work on roads that may be in rural areas. The crews, in essence, set up "camp" near the job site and utilize portable plants for the production of asphalt. The staffing for each crew is established at the beginning of the season, and the members of each crew work together throughout the season. There is no evidence suggesting that crews transfer employees among one another, and, on the contrary, it appears that the crews are geographically separated from one another.

As the name suggests, operators' primary responsibilities are to run equipment ranging from self-propelled brooms that clean up debris, to pavers and rollers. Operators also are responsible for making sure that the asphalt plants (both portable and permanent) run properly. Truck drivers are principally responsible for transporting asphalt from the asphalt plants to the job sites. Finally, laborers string the line to guide the pavers, perform hand work around the paver as it lays asphalt, put down temporary center lines with tape, and perform other tasks as needed. The Employer maintains,

however, that all jobs overlap; that operators drive trucks and perform laborers' work; that truck drivers operate equipment and perform laborers' work; and that laborers operate, among other equipment, the self-propelled brooms. All of the Employer's job descriptions state that the employees must do jobs as directed by the supervisor. Some operator and truck driver job descriptions specifically state that employees must be able to shovel spilled hot mix and aggregate at either the plant site or job site. All witnesses appear to agree that spilled hot mix constitutes an emergency situation requiring the assistance of all employees present in the area. While the Employer maintains that all three classifications (operator, truck driver and laborer) perform one another's work on a daily basis, some of Petitioner's witnesses stated that the performance of work in other classifications was sporadic. For example, a roller operator testified that he shoveled "once in a while." However, he also testified that he drives the water truck to fill it up, which can take up to one hour. A rubber tire roller operator testified that it would be "unusual" for him to shovel, but that he sometimes assists with laying down highway lines. He also drives the parts truck when the Employer moves from one job site to another, which occurs at least ten times a season. He also "helps out" driving truck. Finally, a plant tender testified that his job involved a little bit of everything, and that some of his work would be considered operator and some laborer. In evidence are payroll records showing hours worked by each employee during the 1999 season, including code numbers reflecting jobs performed by the employees. The payroll records show that some employees never performed work outside of their classification (at least that was recorded on the employees' time records) while other employees are similar to Robert Qunell, who was paid about 108 hours as a laborer, about 795 hours as a driver, and about 833 hours as an operator. The Employer further maintains that

any assistance given outside of an employee's primary classification that is less than about one hour is not necessarily recorded by the employee, so that the payroll records do not reflect all instances of work performed outside one's primary classification.

The Employer emphasizes that each crew works as a team, and therefore there is a high degree of functional integration. For example, when the Employer puts a two-inch mat over the top of an existing asphalt road (a common project), the crew cleans the road, "shoots the tack" (tack is a glue that holds mats together), and lays the mix down, at which time it is packed down by rollers. The laborers on the crew string the line that guides the pavers and do hand work around the paver (presumably as the paver operates). The truck drivers transport the asphalt from the plant to the project. The operators run equipment to lay the asphalt and roll it.

The Employer does not require applicants for operator positions to possess special skills or education, and frequently does not require experience. The Employer argues that its practice is to "promote" from within and move laborers and/or truck drivers into operator jobs. In fact, it appears that a number of the Employer's operators (including all of Petitioner's witnesses) started with it as laborers or truck drivers. Most of the training of operators is completed on the job. Truck drivers are required to meet DOT regulations, including possessing a Commercial Drivers License (CDL). However, it appears that a number of the Employer's operators and laborers possess CDLs and assist with driving as needed, including when the Employer's crews move from one job site to another. All employees on a crew assist in setting up the portable asphalt plants when they are moved to a new job site.

All of the Employer's employees have the same benefits and are subject to the same work rules, and members of each crew work about the same schedule of hours.

Pay rates vary among the three classifications (but the record is silent with regard to specific rates), and also among operators in the operator classification. The most recent pay increase was 55 cents per hour for all of the Employer's employees.

In view of the foregoing and the record as a whole, I conclude that a unit limited to the Employer's operators is not appropriate for collective bargaining. The Board has long held that units in the construction industry may be appropriate on the basis of a craft unit, a departmental unit, or as long as the requested employees are a clearly identifiable and homogeneous group with a community of interest separate and apart from other employees. Brown & Root Braun, 310 NLRB 632, 635 (1993). The record herein fails to establish that Petitioner's proposed unit constitutes a craft unit. It is clear that the Employer's operators do not participate in a traditional apprenticeship program and do not achieve journeyman status, and that the Employer does not operate along traditional craft designations. The operator unit proposed by Petitioner also does not constitute a functionally distinct group with common interests separate from the Employer's laborers and truck drivers. Rather, it is clear that the Employer's organizational structure emphasizes crews that contain a mix of operators, truck drivers and laborers. Each crew is separately supervised and works on separate job sites which may be geographically separated from the job sites of other crews. While there is daily contact among members of each crew, there is no evidence of regular contact among members of different crews. Thus, the operators of each crew have daily contact with the truck drivers and laborers of their own crews, but appear to have little work-related contact with operators of other crews. Moreover, the record is clear that while each crew is functionally integrated, operators are not functionally integrated when comparing one crew of operators to another. In addition, the record contains many

examples of employees who began with the Employer as laborers or truck drivers and became operators. It is also clear that operators drive trucks and perform laborer work; that truck drivers operate equipment and perform laborer work; and that laborers are expected to operate self-propelled brooms and, on occasion, drive trucks and operate other equipment. While Petitioner disputes the frequency of the interchange, it appears to occur on a daily basis; and, clearly, the Employer has set up its crews to act as teams, and, to the extent one classification needs assistance, other members of the crew provide the assistance. Finally, all employees have the same benefits, are subject to the same work rules and working conditions, and are commonly supervised by crew foremen and/or plant superintendents. Accordingly, the record herein does not support a conclusion that the Employer's operators constitute an appropriate unit. Brown & Root Braun, supra; Longcrier Co., 277 NLRB 570 (1985); Brown & Root, 258 NLRB 1002 (1981).

6. The following employees of the Employer constitute a unit appropriate[2] for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

[2] Although the unit found appropriate herein is broader in scope than that sought by Petitioner, I shall not dismiss the petition inasmuch as Petitioner has not disclaimed interest in the broader unit. In these circumstances, in accord with established Board policy, I shall direct an election in the appropriate unit conditioned upon the demonstration by Petitioner within fourteen (14) days from the issuance hereof that it has made an adequate showing of interest in the broader unit. In the event Petitioner does not wish to participate in the election in the unit found appropriate herein, I shall permit it to withdraw without prejudice upon notice to the Regional Director within fourteen (14) days from the date of issuance of this Decision or, if applicable, from the date the Board denies any request for review of the unit-scope findings in this Decision. Independent Linen Service Company of Mississippi, 122 NLRB 1002, 1005 (1959).

All full-time and regular part-time equipment operators, laborers and truck drivers employed by the Employer; excluding office clerical employees, guards, managers, and supervisors as defined in the Act, as amended, and other employees.[3]

DIRECTION OF ELECTION[4]

An election by secret ballot will be conducted by the undersigned among the employees in the unit found appropriate in the manner set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are persons who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees

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[3] The record contains little or no evidence regarding mechanics or technicians. The Employer took the position at the hearing that "some" of each should "possibly" be in the broader unit. I am unable, on the basis of the record, to determine what mechanics or technicians even do or where they perform their jobs, and therefore make no findings as to their inclusion or exclusion from the unit.

[4] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **May 8, 2000**.

engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[5]

Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by International Union of Operating Engineers, Local 49, AFL-CIO.

Signed at Minneapolis, Minnesota, this 24th day of April, 2000.

/s/ Ronald M. Sharp

Ronald M. Sharp, Regional Director
Eighteenth Region
National Labor Relations Board

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[5] To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that **two** copies of an election eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. In order to be timely filed, these lists must be received in the Minneapolis Regional Office, Suite 790 Towle Building, 330 Second Avenue South, Minneapolis, MN 55401, on or before **May 1, 2000**. No extension of time to file this list may be granted by the Regional Director except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.